Filed 11/13/20 P. v. Goldberg CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
JON DAVID GOLDBERG,
Defendant and Appellant.

A155885

(Humboldt County
Super. Ct. Nos.
CR1700516/CR1604370)

ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT

THE COURT:

Appellant's petition for rehearing is denied. It is ordered that the opinion filed on October 23, 2020, is modified as follows:

1. On page six, at the end of the paragraph that begins with "Here, with respect to the prosecution's use of the word 'murder' in questioning witnesses . . .," the following sentence is added:

   For the same reason, the prosecutor was entitled to ask Goldberg about his prior statement.

2. On page eight, before the paragraph that begins with "Finally . . .," the following new paragraph is added:

> Similarly, we find no prejudice based on defense counsel's failure to object to the prosecutor's question to a witness about his call to police regarding a "murder." In the context of a five-week trial in which the jury heard testimony from 35 witnesses, and given the instructions and admonitions ultimately provided by the trial court, there was no reasonable probability of prejudice.

3. On page 9, in the last paragraph, the following sentence is deleted: "Nobody except Goldberg contradicted this testimony." In the next sentence, delete the words "In any case" and replace them with "Although Goldberg points to conflicting evidence, ultimately". That paragraph now reads:

> Goldberg argues that the witness's account was incredible because no bullets exited Smith's body and, therefore, the shots could not have caused the dust that the witness claimed to see. But while the witness may have been mistaken about the dust, or the source of the dust, the more important point is that he saw Smith laying on the ground while being shot. Although Goldberg points to conflicting evidence, ultimately "[i]t was a matter for the jury to decide whether the inference was faulty or illogical" and the court "reminded the jurors that argument was not

evidence." (*People v. Tully* (2012) 54 Cal.4th 952, 1044; see also *People v. Lucas* (1995) 12 Cal.4th 415, 474 (*Lucas*).)

4. On page 10, in the first paragraph, footnote no. 2 is added at the end of the sentence that reads "However, Goldberg did not object and thus failed to preserve the error for appeal." The text of footnote 2 is added as follows:

> Likewise, by failing to object in trial court, Goldberg forfeited his claim that the prosecutor committed misconduct in implying when questioning Goldberg that Smith was shot four times in the back.

In light of the new footnote 2, the remaining footnotes shall be renumbered accordingly.

5. On page 13, in the first paragraph, the following text is deleted: "She did not 'think it was meant to be part of the deliberation because, ..." With the deletion, that sentence is amended to:

> "[P]eople were getting coffee and kind of moving around the room[.]"

6. On page 18, in the paragraph that begins "With respect to the other juror . . .," the following text is deleted from the final sentence: "that was not 'meant to be part of the deliberation because, . . . " With the deletion, that sentence is amended to:

> She described it as a "comment" or "interjection" as "people were getting coffee and kind of moving around the room."

These modifications do not constitute a change in the judgment.

Dated: _____ _____, Acting P. J.

A155885

Filed 10/23/20 P. v. Goldberg CA1/5 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JON DAVID GOLDBERG, Defendant and Appellant.	A155885 (Humboldt County Super. Ct. No. CR1700516/CR1604370)

After Jon David Goldberg shot and killed a man who had an extramarital affair with his wife, a jury convicted him of second-degree murder. Goldberg appeals, asserting misconduct by the prosecutor and members of the jury. We affirm.

BACKGROUND

A.

At the time of the shooting, Goldberg and his wife, Rachel, were married for seven years and had a six-year-old son. The Goldbergs were friendly with Tim Smith and his domestic partner Jessica. The day before the shooting, the Goldbergs went fishing and had dinner with Smith. That night, Jessica discovered nude photographs of Rachel on Smith's phone and confronted Smith. The next morning, Jessica sent Rachel a text message stating that she found the photos and that

Rachel needed to tell her husband. The shooting occurred later that day.

Over the course of the morning, Rachel revealed to Goldberg that she had exchanged nude photos with Smith and had sex with him. Goldberg was angry about the affair, cried intermittently, and drank shots of rum.

Meanwhile, Goldberg exchanged a series of texts with Jessica. He texted her that he would come see her. Jessica texted Goldberg that she wanted to talk with him, then a few minutes later texted to say that he need not come and that she had "kicked Tim out so I don't know if he will be here."

At some point while talking to Rachel, Goldberg retrieved a pistol, loaded it, and snapped it into a holster on his hip. He fired gunshots into a tree that he occasionally used for target practice, then he reloaded the gun.

Goldberg drove 50 minutes to a Verizon store to get a new phone because his was broken. Although he did not usually carry a gun, he brought his gun with him, leaving it in the van while he was in the store. When he was unable to get a phone, he drove home, where he saw that Rachel had left with their son.

Goldberg next went to his neighbor Chad H.'s house, borrowed his phone to call Rachel, and screamed at her about sleeping with Smith and "kidnapping" their son. Goldberg was angry and upset. According to Chad H., Goldberg told him that Smith had slept with his wife and that he "was going to kill that motherfucker."

When he returned home from Chad H.'s house, Goldberg immediately got in his van and drove to Smith's house. His gun was

still in his van. Although Goldberg said he thought Smith would not be home, he recognized Smith's truck parked outside. After twice driving past the house, Goldberg parked behind Smith's truck. The doors to the truck were open. Goldberg took the gun from the floorboard of his van and clipped it to his side in the holster.

As Goldberg got out of his van, he saw Smith emerge from the house and walk toward his truck. Goldberg approached Smith and said, "I thought you were my friend," then shot him multiple times from close range. Smith, who was unarmed, sustained five gunshot wounds—three shots to the chest and two shots toward the left side of his back. Four of the wounds were potentially fatal, and Smith died from his wounds.

A member of a work crew across the street testified that he saw a man "laying on the ground[]" as he was being shot, and he saw "dust blow out from underneath of him [with] each shot." Other than Goldberg, this was the only witness who claimed to have seen the shooting. Several witnesses who heard the shots testified that there was a pause between the first and second shots.

Goldberg testified at trial. Explaining the shooting, Goldberg testified that Smith "reached in his truck with both hands as you reach for a rifle." Goldberg pulled his gun out of the holster and held it up. Smith emerged from the truck unarmed and empty-handed, quickly stepped around the truck's open door toward Goldberg, and grabbed the hand in which Goldberg held the gun. Goldberg said he tried to pull his gun back but accidentally shot Smith in the center of his chest. He testified: "when I pulled back, the gun fired and I just kept firing." "I had my eyes closed as I pulled the trigger. When I opened them, he

was falling to the ground." Goldberg testified that he felt terrified and believed, at the time, Smith was trying to kill him.

Goldberg's primary defense was that he killed Smith in self-defense. Goldberg presented evidence that he believed that Smith would not be home; that he knew Smith kept guns in his truck; and that he believed Smith was reaching for a gun. The first shot was accidental, and he fired the subsequent shots because he believed his life was in danger. He also relied on an imperfect self-defense theory based on his genuine if unreasonable belief that Smith was threatening his life. A forensic psychologist testified that emotional distress can impair one's ability to accurately process information. Goldberg also denied telling Chad H. that he would "kill that motherfucker" but instead said he "should go kick that motherfucker's ass."

In support of a heat of passion theory, Goldberg asserted he was overcome by emotions after learning of his wife's affair with Smith. He presented evidence that he had a peaceful character and that he did not often shoot guns.

The People argued Goldberg did not act in self-defense or in the heat of passion but instead deliberately intended to kill Smith. The People also argued his self-defense claim failed because he purposefully initiated the confrontation with Smith and used more force than reasonably necessary.

B.

The jury found Goldberg guilty of second-degree murder (Pen. Code, § 187, subd. (a))[1] and found true an allegation that he used a

[1] Undesignated statutory references are to the Penal Code.

firearm. The jury found him not guilty of first-degree murder and other counts.

C.

Goldberg filed a motion for new trial based on prosecutor and juror misconduct, which the trial court denied. The court concluded that no prosecutorial misconduct occurred. The court held a hearing on juror misconduct in which 10 jurors testified, and it determined that the presumption of prejudice arising from juror misconduct was rebutted.

The court sentenced Goldberg to a term of 15 years to life and dismissed the firearm enhancement.

DISCUSSION

A.

Prosecutorial Misconduct

Goldberg argues the trial court erred when it denied his motion for a new trial based on claims of prosecutorial misconduct. We conclude that the trial court did not err.

1.

A prosecutor's conduct violates the Fourteenth Amendment to the United States Constitution " ' " 'when it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' " (*People v. Adams* (2014) 60 Cal.4th 541, 568 (*Adams*).) Under state law, a prosecutor's conduct is unlawful " ' " 'only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' " ' " (*Id.*, at p. 568.) " ' " When a claim of misconduct is based on the prosecutor's comments before the jury, . . . ' " the question is whether there is a reasonable likelihood that the jury

construed or applied any of the complained-of remarks in an objectionable fashion. " ' " ' " (*Ibid.*) We generally review a trial court's ruling on prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

2.

Goldberg argues that the prosecutor improperly described Smith's shooting as a "murder" when questioning witnesses and in his closing argument. Our Supreme Court has cautioned that generally a prosecutor should not use the term "murder" when questioning witnesses, although the prosecutor is "free to argue to the jury, after all the evidence [has] been presented, that it should find that a killing was a murder." (*People v. Price* (1991) 1 Cal.4th 324, 480 (*Price*); see also *People v. Garbutt* (1925) 197 Cal. 200, 209 (*Garbutt*).)

Here, with respect to the prosecution's use of the word "murder" in questioning witnesses, we find no misconduct. One of the witnesses, Steve S., told the police that Goldberg said to him, " ' "Dude, I just murdered somebody." ' " At trial, Steve S. admitted that he used the term "murder" when he spoke to the police, but claimed that Goldberg actually said that he "shot" somebody. The prosecutor did not commit misconduct by asking the witness about his prior inconsistent statement. (See *People v. Thomas* (1992) 2 Cal.4th 489, 537 (*Thomas*) ["the prosecutor may try to persuade the jury, on the strength of the evidence, that a witness is unworthy of belief"]; *People v. Dykes* (2009) 46 Cal.4th 731, 764, 769 (*Dykes*).)

Similarly, there was nothing amiss about two other witnesses using the term "murder." Testimony by witnesses cannot be misconduct by the prosecutor. And while the prosecutor did ask a

witness about his call to the police regarding a "murder," Goldberg's counsel failed to object. (See *Price*, *supra*, 1 Cal.4th at p. 447 ["To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition"].)

Next, Goldberg contends that the prosecutor improperly used the term "murder" during closing argument and that his counsel's failure to object constitutes ineffective assistance. The prosecutor used the term more than a dozen times when discussing the timeline of events and the evidence, as opposed to doing so when quoting a witness or expressly arguing that the evidence met the definition of murder.

Assuming the prosecutor's use of the term "murder" during closing argument was improper, the context of the prosecutor's arguments, together with the trial court's instructions and admonitions to the jury, removed any reasonable probability of prejudice. The prosecutor reminded the jury that it was the jury's role to apply the law to the evidence and determine whether or not the shooting satisfied the elements of murder, and he stated that it was the prosecution's position that the evidence showed that Goldberg had committed first degree murder. The prosecutor also used more neutral terms like killing or shooting throughout his argument. The trial court provided three admonitions during the prosecutor's closing argument that made clear the jury should decide the case based on the evidence, not the attorneys' arguments. The court also provided extensive instructions explaining the jury's decision-making role and the requirements for a murder conviction. Accordingly, there was no reasonable probability that the prosecutor's use of the word "murder" prejudiced Goldberg. (See *People v. Johnson* (1951) 105 Cal.App.2d 478, 490-491 [defendant

was not prejudiced by prosecutor's description of defendant as a "murderer" during argument because court admonished jury that " 'statements of counsel are not evidence and must not be considered by them' "]; *Garbutt*, *supra*, 197 Cal. at p. 209 [jury was not influenced by prosecutor's characterization of killing as "murder" given context and admonition promptly given by the court].)

Finally, we reject Goldberg's collateral point that the prosecutor aggravated the references to murder by improperly disparaging the defense in closing argument. It was not misconduct for the prosecutor to disagree with defense counsel's view of the law, assert that Goldberg was not worthy of credence or that his testimony was contrived, or vigorously state his views as to what the evidence shows. (See, e.g., *Thomas*, *supra*, 2 Cal.4th at p. 537; *People v. Panah* (2005) 35 Cal.4th 395, 462-463 (*Panah*).)

3.

Goldberg asserts that the prosecutor committed prejudicial misconduct by arguing to the jury that Smith fell to the ground before Goldberg fired the final shots into his back and by misstating the evidence concerning the number of shots to Smith's back. We disagree.

During closing argument, prosecutors have latitude to express their " 'views as to what the evidence shows and to urge whatever conclusions [they] deem[] proper.' " (*Panah*, *supra*, 35 Cal.4th at p. 463, quoting *People v. Lewis* (1990) 50 Cal.3d 262, 283 (*Lewis*).) They may also "draw inferences from the evidence presented at trial." (*People v. Hill* (1998) 17 Cal.4th 800, 823 (*Hill*), overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) However,

"mischaracterizing the evidence is misconduct." (*Hill*, *supra*, 17 Cal.4th at p. 823.)

The prosecutor drew on reasonable inferences to argue that Goldberg fired the final shots after Smith had fallen to the ground. An eyewitness—a utility worker across the street from the shooting—testified he saw Smith "laying on the ground" and "the dust flying out from under him as the bullets were going through." As the prosecutor contended, this account was corroborated by testimony from other witnesses that there was a pause after the first or the second shot (when Smith presumably fell after being shot in the chest) before Goldberg fired the last shots. Smith also had a bruise on one shoulder and gunshot wounds to his back as well as his chest. While the evidence did not indicate the position of Smith's body when he was shot or how he acquired the bruise, the prosecutor's contentions were based on arguable inferences from the evidence.

Goldberg argues that the witness's account was incredible because no bullets exited Smith's body and, therefore, the shots could not have caused the dust that the witness claimed to see. But while the witness may have been mistaken about the dust, or the source of the dust, the more important point is that he saw Smith laying on the ground while being shot. Nobody except Goldberg contradicted this testimony. In any case, "[i]t was a matter for the jury to decide whether the inference was faulty or illogical" and the court "reminded the jurors that argument was not evidence." (*People v. Tully* (2012) 54 Cal.4th 952, 1044; see also *People v. Lucas* (1995) 12 Cal.4th 415, 474 (*Lucas*).)

Goldberg is correct that the prosecutor misstated the evidence when he asserted that Goldberg fired four shots into Smith's back. The evidence reflected only two entry wounds to his back. However, Goldberg did not object and thus failed to preserve the error for appeal. (*Lucas*, *supra*, 12 Cal.4th at pp. 472-473; *People v. Bell* (1989) 49 Cal.3d 502, 535 (*Bell*).) Moreover, again, the trial court repeatedly instructed the jury that "[n]othing that the attorneys say is evidence" and that the jurors should rely on their own recollections and notes. Defense counsel disputed the point, walked the jury though the evidence, pointed out the lack of a ballistics expert, and urged the jury to "[l]ook at the pictures where they are. You all can see where the shots were." We therefore reject Goldberg's claim.

4.

The record does not support Goldberg's argument that the prosecutor improperly waited until his rebuttal argument to assert that Goldberg could not establish self-defense because he initiated the confrontation and his self-defense was contrived. (See *People v. Robinson* (1995) 31 Cal.App.4th 494, 505 [prosecutor may not give a "perfunctory . . . opening argument designed to preclude effective defense reply"].) To the contrary, the prosecutor's initial closing argument did address these theories by asserting that Goldberg could not establish self-defense because he started the fight and used more force than necessary:

> what we have here is the defendant firing at least five times at a person, who, it's undisputed now, was unarmed, who had never struck the defendant, never threatened the defendant, shot the man in his own front yard, essentially, in front of his house at a place where the defendant had brought a weapon, shot him in the back four times. And even if you believe the defendant, . . . that

> Mr. Smith grabbed his wrist, that is certainly the least amount of force – far less amount of force that Mr. Smith was entitled to use when the defendant came to his house with a loaded revolver and started a confrontation with him. So, the idea that that is self-defense . . . doesn't hold water under the law.

These remarks were sufficient to put Goldberg on notice of the prosecutor's arguments.

5.

We reject Goldberg's argument that the alleged errors cumulatively violated his rights to due process and a fair trial. With respect to cumulative prejudice, "[w]e consider [] only the misconduct to which objection was made in assessing whether notwithstanding the admonitions given the impact was such that reversal is required." (*Bell*, *supra*, 49 Cal.3d at p. 540.) Even if the prosecutor erred by describing Smith's killing as a "murder," and by misstating the number of shots fired into Smith's back, we find no cumulative prejudice because Goldberg failed to preserve the issues by objecting.

In short, the trial court did not abuse its discretion by denying Goldberg's motion for a new trial based on misconduct by the prosecutor.

B.

Juror Misconduct

Goldberg next challenges the trial court's denial of his motion for a new trial based on juror misconduct. We determine de novo whether any misconduct prejudiced the defendant (*People v. Caro* (2019) 7 Cal.5th 463, 521 (*Caro*); see also *People v. Miles* (2020) 9 Cal.5th 513, 602 (*Miles*)) and conclude there was no substantial likelihood that Goldberg suffered prejudice from juror misconduct.

1.

Discussion of sentencing

Goldberg's first claim of misconduct concerns jurors who briefly discussed sentencing during deliberations. (*People v. Allison* (1989) 48 Cal.3d 879, 892 ["A defendant's possible punishment is not a proper matter for the jury's consideration in determining guilt or innocence."].)

a.

First, we summarize relevant information from juror declarations that Goldberg submitted in support of his motion for a new trial as well as juror testimony taken as part of the trial court's inquiry on juror misconduct, excluding information barred by Evidence Code section 1150 relating to jurors' mental processes and subjective reasoning.[2] (*People v. Cox* (1991) 53 Cal.3d 618, 694, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421; *People v. Danks* (2005) 32 Cal.4th 269, 302 (*Danks*); Evid. Code, § 1150.)

The controversy stems from a brief exchange between Juror No. 3 and Juror No. 11. During deliberations, Juror No. 3 stated she could not give Goldberg a 20-year sentence because he was too young. Juror No. 11, the foreperson, said that in a previous trial for which he was a juror, "the defendant got eight years for murder one," and "in our California system people serve half of their time." Juror No. 11 then told the jurors that sentencing is the judge's responsibility. Juror No. 8 recalled that several jurors other than Juror No. 11 said that sentencing was the judge's job, not the jury's. Juror No. 11 was "sure" he did not mention Goldberg's name in commenting about sentencing.

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[2] Thus, we exclude statements by Juror No. 3 and other jurors about how statements made in the jury room allegedly affected the jury's votes.

According to several jurors, the sentencing discussion was short, comprised three or four sentences, and occurred "just in passing." Two jurors (Nos. 5 and 10) did not hear or could not recall any discussion of sentencing. Juror No. 3 explained, "That was just an aside, the whole penalty thing. . . . [I]t was somewhat chaotic. There were . . . discussions going on all around the room." She did not "think it was meant to be part of the deliberation because, . . . people were getting coffee and kind of moving around the room[.]"

The sentencing comment occurred part way, possibly midway, or as much as three-quarters through the deliberations but not at the end. According to Juror No. 12, the jury continued to discuss manslaughter "towards the end of the deliberations." Juror No. 11 testified that the jury spent the rest of the time "talking about what charges the evidence proved." Juror Nos. 1, 12, and 4 confirmed that the deliberations focused on the factors necessary to prove the charges. According to Juror No. 1, sentencing "was not discussed to reach one verdict or another."

The trial court found that Juror No. 11—the foreperson—was a credible witness and that Juror No. 3 was not credible, and Goldberg does not persuade us that these findings are unsupported. (*In re Manriquez* (2018) 5 Cal.5th 785, 804 [assuming trial court considered juror's inconsistent statements and demeanor when making credibility findings].)

b.

Juror misconduct gives rise to a presumption of prejudice. (*In re Boyette* (2013) 56 Cal.4th 866, 892 (*Boyette*).) "The presumption of prejudice may be rebutted by an affirmative evidentiary showing '*or* by

a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct.' " (*In re Carpenter* (1995) 9 Cal.4th 634, 657 (*Carpenter*); see also *Caro*, *supra*, 7 Cal.5th at p. 521.)

When the misconduct concerns information about a party or case from extraneous sources, we apply a two-prong test to determine whether a substantial likelihood of juror bias exists: (1) is the extraneous material, judged objectively, so prejudicial that it is inherently likely to have influenced a juror; or (2) even if the information is not inherently prejudicial, is it substantially likely a juror was " 'actually biased' " against the defendant? (*Boyette*, *supra*, 56 Cal.4th at p. 891; see also *Miles*, *supra*, 9 Cal.5th at p. 601.) If the court finds a substantial likelihood of bias under either prong, the verdict will be set aside. (*Carpenter*, *supra*, 9 Cal.4th at p. 655; see also *Miles*, *supra*, 9 Cal.5th at p. 601.)

c.

Applying the first prong of the test, we conclude the discussion was not " 'so prejudicial in and of itself that it [wa]s inherently and substantially likely to have influenced a juror[.]' " (*Boyette*, *supra*, 56 Cal.4th at p. 891.)

First, the sentencing discussion was not particularly inflammatory. (See *Miles*, *supra*, 9 Cal.5th at p. 602 [considering the nature of extrinsic information and whether it was "inflammatory" in determining whether it was "inherently and substantially likely to have influenced a juror"].) As detailed above, Jurors No. 3 and 11 discussed the possible length of the sentence part way through deliberations.

While the sentencing discussion was irrelevant and contained erroneous information, it was quite brief, and sentencing "was not discussed to reach one verdict or another." Further, it was immediately followed by admonitions that the jury may not consider sentencing. As our Supreme Court has observed, "speculation concerning punishment" is "an inevitable feature of the jury system." (*Dykes*, *supra*, 46 Cal.4th at p. 812.) The brief consideration of sentencing by a jury may be cured and need not require reversal of the judgment. (See, e.g. *People v. Loker* (2008) 44 Cal.4th 691, 750 (*Loker*) ["it was improper for the jurors to discuss the costs of punishment, but . . . the misconduct [was] not prejudicial because the discussion was brief and was met with an admonition from the foreperson"]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1426 (*Leonard*) [jury's discussion of the costs of life imprisonment was harmless where foreperson reminded the jury this was not an appropriate consideration].)[3]

Second, in the context of the trial record here, the discussion was unlikely to have made a difference. (*Carpenter*, *supra*, 9 Cal.4th at p. 654; see also *id.* ["[T]he stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict."].) There was overwhelming evidence supporting a second-degree murder conviction based on implied, if not express, malice. (See *People v. Watson* (1981) 30 Cal.3d 290, 296.) Angry at Smith for sleeping with his wife,

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[3] Goldberg asserts that the foreperson's admonition was insufficient because at least one juror, Juror No. 8, did not hear it. However, Juror No. 8 testified that "we all" explained that sentencing was not the jury's job, but instead was up to the judge to determine. The record thus indicates that even if Juror No. 8 did not hear the foreperson's admonition, Juror No. 8 and the other jurors were well aware of and stated the proper instruction.

Goldberg told his neighbor Chad H. he was going to "kill that motherfucker." Minutes later, he took his loaded pistol—which he had used earlier that morning for target practice—and drove to Smith's house. He recognized Smith's truck, saw him emerge from the house, and confronted him on the driveway. After telling Smith "I thought you were my friend," he shot him five times, twice in the back.

While the evidence of Goldberg's guilt was overwhelming, his self-defense and imperfect self-defense arguments were comparatively weak.[4] Goldberg never offered a plausible explanation for arming himself with a gun when he exited his van: although he testified he was fearful of Smith, there was no evidence that Smith bore him animosity. To the contrary, Goldberg was the one who was angry, and he chose to confront Smith with a loaded revolver when he could have simply driven away. (See *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1332-1333 [no right to self-defense if defendant provoked fight as an excuse to use force].) Moreover, Goldberg's self-defense arguments were based largely on his own testimony that he feared for his life when Smith grabbed his wrist. It is undisputed, however, that Smith was unarmed, and the only independent witness who saw the shooting said that Smith was on the ground while Goldberg continued firing at him.

Goldberg's heat-of-passion argument was similarly tenuous. Heat of passion is a state of mind that reduces the defendant's

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[4] Self-defense, which provides a complete defense to murder, must be "based on a *reasonable* belief that killing is necessary to avert an imminent threat of death or great bodily injury." (*People v. Elmore* (2014) 59 Cal.4th 121, 133-134.) A defendant with an unreasonable but good faith belief that the killing was necessary may rely on a theory of unreasonable or imperfect self-defense, which reduces an unlawful killing from murder to manslaughter. (*Id.* at p.134.)

culpability for an unlawful killing if, " ' "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment. " ' " (*People v. Beltran* (2013) 56 Cal.4th 935, 942; see also *People v. Nelson* (2016) 1 Cal.5th 513, 538-539.) Goldberg asserts that he was distraught after learning of Smith's affair with his wife, he had had no time to cool off, and therefore in shooting Smith he reacted " ' " ' from passion rather than from judgment.' " ' " However, this argument contradicted his testimony that he shot Smith because his gun discharged accidentally and he believed his life was in danger, rather than because he was angry or jealous toward Smith. He further undermined this argument by testifying that shortly before the shooting, he went on a mundane errand to get a new phone at the Verizon store, a 50-minute drive each way. (See 1 Witkin, Cal. Crim. Law (4th Ed. 2020), Ch. IV, § 239 ["circumstantial evidence [such] as rational conversation, transaction of other business, or preparation for the killing" may show that defendant's passions cooled], citing *People v. Golsh* (1923) 63 Cal.App. 609, 617.)

We conclude the discussion was not "inherently and substantially likely" to have made a difference in the verdict. (See *Danks*, *supra*, 32 Cal.4th at p. 305 ["the likelihood of bias under the inherent prejudice test 'must be *substantial*.' "].)

People v. Echavarria (2017) 13 Cal.App.5th 1255, relied upon by Goldberg, is unavailing. That case was close, the evidence of

premeditation was slim, and the jury's discussion of sentencing was more substantial. (*Id.* at pp. 1263, 1267-1268, 1270-1271.)

d.

Neither do we find prejudice under the second prong of the test, which asks whether there is a substantial likelihood that a juror was actually biased, based on a review of the entire record. (See *Boyette*, *supra*, 56 Cal.4th at p. 883; *Carpenter*, *supra*, 9 Cal.4th at p. 654.) Goldberg argues that the record indicates two jurors changed their votes from manslaughter to second degree murder at some point after the sentencing discussion.

However, one of those jurors was Juror No. 10, who did not even recall that sentencing was discussed.

With respect to the other juror, Juror No. 3, Goldberg relies primarily on statements of her mental processes that are barred under Evidence Code section 1150. (*Cox*, *supra*, 53 Cal.3d at p. 694.) In any event, as noted, the trial court reasonably concluded that Juror No. 3 was not credible. Her statements were inconsistent, but she herself suggested that the sentencing discussion was inconsequential: "That was just an aside, the whole penalty thing." She described it as a "comment" or "interjection" that was not "meant to be part of the deliberation because, . . . people were getting coffee and kind of moving around the room."[5]

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[5] Juror No. 1 also testified that Juror 9 initially favored manslaughter. However, Juror 9 was specifically asked about the jurors that leaned toward manslaughter, and he said he was only aware of two jurors who mentioned a desire to consider manslaughter: Jurors No. 10 and 3. Juror No. 3 testified that Juror No. 9 favored murder one.

Finally, the evidence does not suggest any other juror was likely to have been actually biased by the sentencing discussion. Although Juror No. 11 commented on sentencing, he testified that he did so in response to Juror No. 3 raising the issue. Moreover, the brief discussion was immediately followed by juror admonitions that they should *not* consider sentencing. (*People v. Pinholster* (1992) 1 Cal.4th 865, 925 ["The presumption of prejudice may be dispelled by an admonition to disregard the improper information."], disapproved of on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 459; *Loker*, *supra*, 44 Cal.4th at p. 750; *Leonard*, *supra*, 40 Cal.4th at p. 1426.) The jury also received an instruction on this point, each received a personal copy of the instructions, and they read the instructions "very carefully several times" The references to sentencing were brief and "in passing." The vast majority of the jury's time was spent discussing the factors necessary to prove the charges and the evidence. The jury did not discuss sentencing "to reach one verdict or another." Further, even after the sentencing discussion, the jury continued to discuss manslaughter.

In sum, we conclude there was no substantial likelihood of juror bias stemming from the sentencing discussion.

2.

Other Allegations of Juror Misconduct

Goldberg's remaining contentions based on juror misconduct similarly lack merit.

a.

The record does not support Goldberg's assertion that Juror No. 11 was biased because he deliberated under a mistaken understanding

that the defendant was guilty of first-degree murder unless proven otherwise. Juror No. 11 testified credibly that he never told the other jurors that "it was up to [the other jurors] to prove it wasn't first degree murder." Juror No. 1 likewise testified that she did not hear him make such a statement. Although Juror No. 3 testified to the contrary, as discussed, the trial court reasonably found Juror No. 3 not credible. Juror No. 11 testified that the other jurors "did not know my [subjective] feelings about what I felt about it" until the end of deliberations. This vague statement suggests that Juror No. 11's own preliminary opinion was that Goldberg had committed first-degree murder, but does not establish that Juror No. 11 had a mistaken understanding about the applicable burden of proof. In the end, of course, the jury voted unanimously for second degree murder.

b.

We reject Goldberg's contention that he was prejudiced when Juror No. 8 relied on his own experience with firearms during deliberations. Juror No. 8 suggested that the shooting must have been premeditated because Goldberg's gun had to be cocked each time it was fired. Our Supreme Court has concluded that similar comments do not constitute misconduct. (See *Leonard*, *supra*, 40 Cal.4th at p. 1414 [where juror "relied on his personal experience with firearms" during deliberations, "[h]is comments were a normal part of jury deliberations and were not misconduct"].) In any event, the remarks here were neither inherently nor actually substantially likely to be prejudicial. Two other jurors immediately explained to Juror No. 8 that "your pistol is different from this one. It doesn't have to be cocked each time. It will fire after the trigger is pulled." As Juror No. 8 explained, "I

thanked [them] for correcting me on that, and we moved on with the discussion."

c.

Finally, Goldberg argues that he was prejudiced when three jurors discussed the case in the courthouse café. We disagree.

Goldberg asserts the trial court failed to conduct an adequate inquiry when the misconduct was discovered. A court faced with potential juror misconduct " ' "must 'make whatever inquiry is reasonably necessary' " to resolve the matter.' " (*People v. Linton* (2013) 56 Cal.4th 1146, 1213.) The court has " 'considerable discretion in determining how to conduct the investigation.' " (*Id.*) Here, the trial court heard testimony from an attorney who overheard three jurors speaking for about three minutes; they said something to the effect of, "Okay. So then we'll do that. Okay. Let's go back." She also heard two of the jurors use the words "self-defense."

After this testimony, the court informed Goldberg's counsel that "[t]he ball is in your court," but counsel did not request any further inquiry or move for any relief. The court resolved to remind the jury that they were not to deliberate about the case outside the jury room, and defense counsel merely requested that the jury not be informed of the party who had brought this issue to the court's attention. The court proceeded to admonish the jury. (See *People v. Bell* (2019) 7 Cal.5th 70, 120 ["by not asking for additional questioning," defendant forfeited claim that trial court conducted inadequate inquiry into juror misconduct].)

In any event, the court received additional evidence on Goldberg's motion for a new trial. Juror No. 12 testified that he spoke with Juror

Nos. 8 and 11 in the courthouse café, but the discussion was limited to how they could facilitate the conversation and keep deliberations moving along. Juror No. 11 testified that they did not deliberate about the case and did not discuss self-defense. He said they were brainstorming about problem solving. Goldberg also presented a declaration from the attorney who had testified earlier, reiterating her testimony, as well as one from a second attorney who overheard the jurors discussing self-defense.

Although the trial court did not make express factual findings on his ruling that the prosecution had rebutted the presumption of prejudice arising from this misconduct, the court did find that Juror No. 11 was credible and that the jurors called by the prosecution generally testified consistently. The court therefore implicitly credited the testimony of Juror Nos. 11 and 12, which reflected that the jurors did not deliberate about the case or discuss self-defense. While their accounts differed from that of the attorneys, the trial court's credibility finding was based on observing the jurors' demeanor and is supported by substantial evidence. (See *People v. Stanley* (2006) 39 Cal.4th 913, 951.)

It is misconduct for jurors to discuss case-related matters outside the presence of the entire jury and the deliberation room. (*See People v. Wilson* (2008) 44 Cal.4th 758, 838-839.) However, the evidence credited by the trial court does not suggest any juror was actually biased based on this incident. Moreover, the court immediately re-admonished the jury not to discuss the case outside the deliberation room. Under the circumstances here, the presumption of prejudice arising from the jurors' brief discussion of the case was rebutted. (Cf. *People v.*

Lavender (2004) 60 Cal.4th 679, 691 ["Where . . . a mistake by one or more jurors . . . is promptly followed by a reminder" of the court's instructions, "the reminder tends strongly to rebut the presumption" of prejudice from misconduct, absent "any objective evidence that the reminder of the court's instructions was ineffective"].)

In *People v. Burgener* (1986) 41 Cal.3d 505 (*Burgener*), overruled on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753, and *People v. Hem* (2019) 31 Cal.App.5th 218 (*Hem*), cited by Goldberg, the record on appeal was insufficient to determine whether there was good cause to discharge any juror due to the inadequate inquiry below. (See *Burgener*, *supra*, 41 Cal.3d at pp. 520-522; *Hem*, *supra*, 31 Cal.App.5th at p. 229.) Here, in contrast, the court ultimately received live testimony from two jurors and an attorney witness, as well as declarations from two attorneys. Goldberg had an opportunity to question Juror No. 8 on this topic and declined to do so. Because the record was sufficient to determine the extent of the misconduct and to rebut the presumption of prejudice, we affirm. (See *Leonard*, *supra*, 40 Cal.4th at p. 1412 [court's failure to investigate juror misconduct "does not require reversal unless the record shows that defendant was prejudiced"].)

DISPOSITION

The judgment is affirmed.

_____
BURNS, J.

We concur:

_____
SIMONS, ACTING P.J.

_____
REARDON, J.*

A155885

* Judge of the Superior Court of Alameda County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.